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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, *AMICI CURIAE*

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Interest of *Amici*

The American Civil Liberties Union and its Pennsylvania affiliate, the Pennsylvania Civil Liberties Union, are organizations dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

Freedom of expression is a particular facet of this concern. Accordingly, this brief of *amici curiae* is filed because it appears to us that the federal felony conviction of a publisher for using the mails to distribute to the public books and magazines about whose aesthetic merit responsible opinion varies widely, abridges the freedom of

expression guaranteed by the First Amendment—both as to the right of the distributor to disseminate and the corresponding right of members of the adult public to exercise their freedom of choice in determining for themselves what forms of artistic and literary expression they will experience.

Our interest is not in the protection of smutty books and magazines, nor do we presume to judge the artistic merit of the publications whose distribution caused petitioners' conviction here. Neither is our interest limited to our objection to the suppression of the particular books and magazines here involved. Our concern is that, suppressed in addition to these publications, is the courage of this distributor and others to continue to disseminate the entire spectrum of artistic and literary creativity, for fear of future prosecutions.

In the firm belief that "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit,"[1] and in the hope that it will be of some assistance to the Court in dealing with its great task of preserving freedom of expression from "insidious encroachment by men of zeal, well-meaning but without understanding,"[2] this brief is filed.

The written consent of the parties to this appearance of *amici* has been filed with the Clerk of the Court.

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[1] *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, 695 (1959) (Frankfurter, *J.,* concurring).

[2] *Olmstead* v. *United States,* 277 U. S. 438, 479 (1928) (Brandeis, *J.,* dissenting).

Statement of Facts

Petitioners were indicted and convicted on twenty-eight counts of mailing obscene publications and advertisements for such publications in violation of 18 U. S. C. §1461. The publications in issue were a magazine, *Eros,* Vol. 1, No. 4, a book, *The Housewife's Handbook of Selective Promiscuity,* and a newsletter, *Liaison,* Vol. 1, No. 1.

At the trial before the District Court, sitting without a jury, it was stipulated that petitioners had mailed the challenged publications with knowledge of the contents and, after presenting some evidence to show criminal intent, the prosecution introduced the publications and rested. A defense motion for acquittal was denied.

For its case, the defense offered the expert testimony of a clinical psychologist, a practicing psychiatrist, literary critic Dwight MacDonald, the chairman of the fine arts department of New York University and a Baptist minister, who testified in sum that the publications, while admittedly erotic in character, did not go beyond customary limits of candor, were not patently offensive and had no tendency to arouse the prurient interest of the average adult, that some of the material in *Eros* had considerable literary and artistic merit, that the *Housewife's Handbook* involved the advocacy of ideas and had educational and clinical value. The prosecution introduced rebuttal testimony of two psychiatrists and a Baptist minister. Their testimony was admitted for the limited purpose of rebutting the expert testimony offered by the defense and not as affirmative evidence in the prosecution's case in chief.

All of the publications were held to be obscene within the meaning of *Roth* v. *United States,* 354 U. S. 484 (1957), and petitioners were found guilty on all counts.

Petitioner Ginzburg, a first offender, was sentenced to five years imprisonment and a fine of $28,000.00. The corporate petitioners were fined a total of $14,000.00. The Court of Appeals for the Third Circuit affirmed the convictions. Sentences have been stayed pending determination of the validity of the convictions by this Court.

Summary of Argument

Inasmuch as the petitioner was convicted on counts of mailing obscene publications and advertisements for such publications in violation of 18 U. S. C. §1461 under the verbal formula for determining what is obscene for constitutional purposes, announced in *Roth* v. *United States*, 354 U. S. 476 (1957), and interpreted in subsequent cases, it is appropriate for *amici curiae*, in urging reversal of the conviction below, to re-examine that holding.

In light of the imperatives of freedom of expression and the decisions and sociological studies since the enunciation of the *Roth* rule, we urge the Court to reconsider certain aspects of that decision.

We contend that:

I. All utterances are within the protection of the First Amendment and may not be restricted unless there is a clear and present danger that they will bring about a substantive evil to society unless restrained.

II. The test of obscenity as announced in *Roth* v. *United States* and interpreted in subsequent decisions is vague and unworkable and tends to inhibit the dissemination of expression which is not obscene and

clearly within the protective scope of the First Amendment.

Each of these contentions will be discussed in sequence and detail below.

ARGUMENT

I.

All utterances are within the protection of the First Amendment and may not be restricted unless there is a clear and present danger that they will bring about a substantive evil to society unless restrained.

When this Court held in *Roth* v. *United States,* 354 U. S. 476, 485 (1957) "that obscenity is not within the area of constitutionally protected speech or press" it embarked upon a philosophic voyage in the law of obscenity whose consequences to freedom of expression can only be unfortunate, to say the least.

Until *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), this Court had never held that any form of utterance was *per se* outside the scope of the protection of the First Amendment. All forms of expression were subjected, rather, to the "clear and present danger" standard[3] within

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[3] See Holmes, *J.*, for the Court in *Schenck* v. *United States,* 249 U. S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." See also *Abrams* v. *United States,* 250 U. S. 616 (1919) (dissenting opinion), *Gitlow* v. *New York,* 268 U. S. 652 (1925) (dissenting opinion), *Whitney* v. *California,* 274 U. S. 357 (1927) (concurring opinion of Brandeis, *J.*). And see *Bridges* v. *California,* 314 U. S. 252, 263, 265 (1941)

the framework of the First Amendment to determine whether governmental restraint was constitutionally permissible.

In *Chaplinsky,* however, the Court for the first time articulated a concept of "unprotected speech", based not upon its dangerous consequences to society, but upon its lack of social value. Upon facts which might well have been similarly resolved with less violence to settled First Amendment principle,[4] Mr. Justice Murphy stated the proposition broadly:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[5]

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which held that freedom of expression was entitled to "the broadest scope that could be countenanced in an orderly society," subject only to the requirement of the clear and present danger standard, defined as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

[4] The epithets and vituperative remarks here involved and described as "fighting" words might have been disposed of as "words that . . . have all the effect of force," *Schenck* v. *United States,* 249 U. S. 47, 52 (1919) or as expression "so closely brigaded with illegal action as to be an inseparable part of it," *Roth* v. *United States,* 354 U. S. 476, 514 (1957) (Douglas, *J.* dissenting) but *within* the protection of the First Amendment.

[5] *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571-572 (1942).

Ten years later, in *Beauharnais* v. *Illinois,* 343 U. S. 250 (1952), a different class of expression—libel—was exempted from the protection of the First Amendment and measurement against "clear and present danger" standards. In upholding the constitutionality of a state statute prohibiting group libel, Justice Frankfurter, speaking for a closely divided Court,[6] said:

> "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger'. Certainly no one would contend that obscene speech for example, may be punished only upon a showing of such circumstances.[7] Libel, as we have seen, is in the same class."[8]

In *Roth* v. *United States,* 354 U. S. 476 (1957), this Court considered yet another form of utterance—obscenity—for the first time. Following *Beauharnais* despite vigorous arguments to the contrary,[9] the Court transformed the dicta

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[6] *Beauharnais* v. *Illinois,* 343 U. S. 250 (1952). See dissenting opinions of Black, *J.* at 267, Reed, *J.* at 277, Douglas, *J.* at 284 and Jackson, *J.* at 287.

[7] That Justice Frankfurter's assessment of the number of those who would precisely so contend is, to say the least, conservative. See, e.g., *United States* v. *Roth,* 237 F. 2d 796, 801 (2d Cir. 1956) (Frank, *J.* concurring); *Roth* v. *United States,* 354 U. S. 476, 508 (1957) (Douglas, *J.* and Black, *J.* dissenting); *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101 (1949); and see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* The Supreme Court Review 191, 214 (1964).

[8] *Beauharnais* v. *Illinois,* 343 U. S. 250, 266 (1952).

[9] "It is strenuously urged that these obscenity statutes offend the constitutional guarantees because they punish incitation to impure sexual thoughts, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated

in that decision into a square holding: that obscene utterances are not within the ambit of First Amendment protections and may be constitutionally suppressed in complete disregard of clear and present danger standards.[10]

In thus emancipating itself, so far as obscene publications are concerned, from the First Amendment requirement that a clear and present danger of overt anti-social conduct must be demonstrated before utterances may be suppressed, this Court has necessarily taken upon itself the task of determining whether utterances may be constitutionally suppressed solely by the technique of cataloguing and labeling them, rather than by analyzing the nature of the particular words sought to be suppressed and the circumstances under which they are uttered to determine the precise point at which such expression must give way to the overriding requirements of society.

As a consequence, the factual separation of obscene utterances, which may be suppressed, from protected

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to such thoughts . . . It is insisted that the constitutional guarantees are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais* v. *Illinois*. . . ." *Roth* v. *United States*, 354 U. S. 476, 485-86 (1957).

[10] Even if it is conceded *arguendo* that *Beauharnais* was rightly decided, a substantial argument can be made that the transfer of the "unprotected speech" doctrine from libel to obscenity is unwarranted because by definition libel requires *proof of harm to another* as an essential element, see 53 C. J. S. §4, *Libel and Slander*, while no such proof can be mustered with respect to obscene material. See also *Beauharnais* v. *Illinois*, 343 U. S. 250, 256 (1952) in which the Court found that group libel posed a threat of violence.

speech, which may not,[11] has necessarily occupied a substantial portion of this Court's attention since *Roth*.[12]

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[11] In the area of obscenity, the determination that a publication is protected speech is, in most instances and for all practical purposes, dispositive of the question of whether it may be constitutionally suppressed. For it has not yet been demonstrated, to satisfy the clear and present danger standard, that pornography bears any causative relation whatever to overt anti-social conduct which society may legitimately prevent. See Judge Frank's collection of studies of the behavioral sciences in *United States* v. *Roth*, 237 F. 2d 796, 812 (2d Cir. 1956); Lockhart & McClure, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938); Jahoda and staff of Research Center for Human Relations, New York University, *The Impact of Literature, A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954); Cairns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (1962); *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949); The Institute for Sex Research, Inc., *Sex Offenders* (1965) pp. 126-127, 669-692; and see Murphy, *The Value of Pornography*, 10 Wayne L. Rev. 655 (1964).

[12] *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, *reversing* 244 F. 2d 432 (7th Cir. 1957) (the movie, "The Game of Love," held: not obscene); *Mounce* v. *United States*, 355 U. S. 180, *reversing* 247 F. 2d 148 (9th Cir. 1957) (an imported collection of nudist and art student publications containing many nude photographs, held: not obscene); *One, Inc.* v. *Olesen*, 355 U. S. 371 (1958), *reversing* 241 F. 2d 772 (9th Cir. 1957) ("One—The Homosexual Magazine," held: not obscene); *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372 (1958), *reversing* 249 F. 2d 114 (D. C. Cir. 1957) ("Sunshine & Health" and "Sun Magazine," held: not obscene); cf. *Kingsley-Int'l Pictures Corp.* v. *Regents*, 360 U. S. 684 (1959) (the French motion picture, "Lady Chatterley's Lover," held: the statute under which conviction for exhibition of the film had been obtained violated the First Amendment's guarantee of freedom to advocate ideas); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962) (homosexual magazines with photographs of nude or near nude male models, held: not obscene); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964) (French motion picture, "The Lovers" held: not obscene); see also *Grove Press, Inc.* v. *Gerstein*, 378 U. S. 577 (1964); *Tralins* v. *Gerstein*, 378 U. S. 576 (1964); *Trans-Lux Distrib. Corp.* v. *Board of Regents*, 85 Sup. Ct. 952 (1964).

Recognizing that "a dim and uncertain line" [13] separates obscenity from protected speech, this Court has been faced with the problem of how such fine distinctions, fraught with First Amendment implications, can be made.

A primary problem has been determining who may properly decide such matters. A number of negative answers have emerged from the decided cases.

Neither a police officer,[14] an administrative board,[15] the postal authorities,[16] the booksellers,[17] a police board of censors,[18] a judge without a full hearing,[19] a judge sitting without a jury *after* a full hearing,[20] nor even a jury[21] may be the final arbiter of this ultimate issue.

Nor have the various courts of appellate review distinguished themselves for their ability to divine this Court's intentions on the matter.[22]

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[13] *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205, 210 (1964). And see *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963).

[14] *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961).

[15] *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963).

[16] *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962).

[17] *Smith* v. *California*, 361 U. S. 147 (1959).

[18] *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1961).

[19] *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205 (1964).

[20] *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 448 (1957).

[21] *Jacobellis* v. *Ohio*, 378 U. S. 184, fn. 6 (1964).

[22] Cf. *State* v. *Jacobellis*, 115 Ohio App. 226, 230, 175 N. E. 2d 123, 125 (1961): ". . . the motion picture film in issue is obscene, lewd and lascivious within the definition . . . set forth in *Roth* v. *United States* . . ."; *State* v. *Jacobellis*, 173 Ohio St. 22, 28, 179 N. E. 2d 777, 781 (1962) (Ohio Supreme Court found the film depicted episodes "of complete revulsion during the showing of an act of perverted obscenity" and was worse than hard-core

This Court has consequently been required to sift the facts in each case in order to determine the constitutional implications of suppressing the publications and motion pictures brought to its attention. Given the law of obscenity in its present posture, there can be no quarrel with this assumption of judicial responsibility; but, unfortunately, since it assumed this role in *Roth* v. *United States,* this Court has been unable to obtain a consensus among its members nor articulate sufficiently detailed working principles for the classification of utterances which *Roth* compels[23] to guide the state and federal courts and legislatures upon whose performance the preservation of freedom of speech must ultimately depend.

Amici contend that a constitutional principle which requires a fine factual discrimination to be made by qualified persons who cannot be found, according to standards which cannot be articulated, is, in fact, not a rule of law at all,

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pornography). But see *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964) (film held not obscene). See also *Times Film Corp.* v. *City of Chicago,* 355 U. S. 35, *reversing* 244 F. 2d 432 (7th Cir. 1957); *Mounce* v. *United States,* 355 U. S. 180, *reversing* 247 F. 2d 148 (9th Cir. 1957); *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372 (1958), *reversing* 249 F. 2d 114 (D. C. Cir. 1957).

[23] Cf. *Jacobellis* v. *Ohio,* 378 U. S. 184, 200 (1964) (Warren, *C.J.*, dissenting): "... most of our decisions since Roth have been given without opinion and have thus failed to furnish ... guidance [to the lower courts and legislatures]. Nor does the Court in the instant case ... shed any greater light on the problem." And see Stewart, *J.*, concurring in *Jacobellis:* "I shall not today attempt ... to define the kinds of material [which may be suppressed]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it and the motion picture involved in this case is not that.*" (Emphasis supplied.) 378 U. S. 184, 197 (1964). Cf. *Haldeman* v. *United States,* 340 F. 2d 59, 62 fn. 6 (10th Cir. 1965): "The writer of this opinion has also felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters."

but rather, a license to adjudicate by whim and caprice.[24] Such a constitutional scheme is particularly dangerous in the sensitive area of First Amendment freedoms which "need breathing space to survive" and in which "government may regulate . . . only with *narrow specificity.*"[25] (Emphasis supplied.)

But there is another, more substantive reason for reconsidering the *Roth* holding that obscenity is not protected speech and returning to the First Amendment philosophy by whose standards other forms of speech are measured. It lies in the historical and cultural and philosophic origins of our concern for preserving a free society and the integrity of thought and utterance of each of its members.

One of the principal architects of First Amendment philosophy, John Stuart Mill, in his Essay on Liberty, stated his conception of the proper relationship between man and society as follows:

> ". . . the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [*T*]*he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.* His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even

[24] "In truth the matter in the last analysis depends upon how particular challenged material happens to strike the minds of jurors and judges and ultimately those of a majority of the members of this Court." *Jacobellis* v. *United States,* 378 U. S. 184, 204 (1964) (Harlan, *J.*, dissenting).

[25] *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 433 (1963).

right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. * * * Over himself, over his own body and mind, the individual is sovereign.

* * * * *

"* * * No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.

* * * * *

"* * * [W]ith regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom." (Emphasis added.)

This philosophy—that a man's mind and thoughts are his own, and that he may express his opinions without societal restraint on any subject, whether or not these thoughts appear to have any social value to the rest of the citizenry, until it can be demonstrated that his utterances will necessarily harm another—has been compressed into what is called the "clear and present danger" standard. Not a mere slogan, its central meaning was laid bare by

Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 376-77 (1927):

> "To justify supression of free speech *there must be reasonable ground to fear that serious evil will result if free speech is practiced.* There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.
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> * * * * *
>
> " 'Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'* " (Emphasis supplied.)

The distinction between speech which stirs the minds of men and speech which induces anti-social conduct or, to put it another way, between utterances which affect *thoughts* and those which incite to *action,* capsulized in the clear and present danger formula, has traditionally been of overriding importance in determining when the state may properly suppress speech. "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded

with illegal *action* as to be an inseparable part of it."[26] (Emphasis supplied.)

This insistence upon a showing of the most urgent necessity before curbing expression is an attitude which pervades the decided cases of this Court, both before and since *Roth*.[27] This standard has been consistently applied to all kinds of utterances, even though they may be foolish, stupid, tasteless, or pure rubbish—except in one sphere: publications on the subject of sex which are labeled "obscene." Expression which urges the overthrow of the government,[28] utterances which urge economic pressure against employers,[29] publications which libel public officials,[30] sym-

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[26] *Roth* v. *United States*, 354 U. S. 476, 514 (1957) (dissenting opinion). See also Douglas, *J.*, dissenting in *Beauharnais* v. *Illinois*, 343 U. S. 250, 284 (1952):

> "My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster."

See also dissenting opinions of Reed, *J.*, Black, *J.* and Jackson, *J.* in *Beauharnais*.

[27] Early cases which applied stringent clear and present danger standards to the suppression of speech or press, such as *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), *Thornhill* v. *Alabama*, 310 U. S. 88, 104-105 (1940), *Cantwell* v. *Connecticut*, 310 U. S. 296, 311 (1940), *Thomas* v. *Collins*, 323 U. S. 516, 536 (1945), *Pennekamp* v. *Florida*, 328 U. S. 331 (1946) and *Terminiello* v. *Chicago*, 337 U. S. 1, 4-5 (1949) may appear to have been modified by the "gravity of the 'evil' discounted by its improbability" test applied in *Dennis* v. *United States*, 341 U. S. 494, 510 (1951); but compare *Yates* v. *United States*, 354 U. S. 298 (1957). Later decisions of this Court indicate that the *Dennis* test is limited to its peculiar facts. See *Edwards* v. *South Carolina*, 372 U. S. 229, 237-238 (1963), *Wood* v. *Georgia*, 370 U. S. 375, 385 (1962), *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) and *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

[28] *Herndon* v. *Lowry*, 301 U. S. 254 (1937).

[29] *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

[30] *New York Times* v. *Sullivan*, 376 U. S. 254 (1964).

bols said to foster class antagonism,[31] vituperative speech which charges racial and political groups with shocking offenses in a highly charged atmosphere[32]—in all of these cases the First Amendment has been quite properly interposed between government and the speaker to protect the utterance.

But publications on "sexy" subjects receive unique treatment,[33] not because such matter constitutes a *threat* to society, but because it is "utterly without redeeming social importance," [34] or, to state the proposition differently, "obscenity . . . is forbidden, in large part, not because it incites but because it offends." [35]

Amici submit that offense to the sensibilities of the audience is no proper ground for suppressing any speech. As long as the audience chooses voluntarily to submit to the offensive material, government may not intervene. See *Public Utilities Commission* v. *Pollack,* 343 U. S. 451, 468-469 (1952).

We are at one with Mr. Justice Douglas, dissenting in *Roth,* when he said:

> "I would give the broad sweep of the First Amendment full support. I have the same confidence in the

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[31] *Stromberg* v. *California,* 283 U. S. 359 (1931).

[32] *Terminiello* v. *Chicago,* 337 U. S. 1 (1949).

[33] *Roth* v. *United States,* 354 U. S. 476 (1957).

[34] *Id.* at 484. See discussion of the futility of dealing with this concept, *infra,* pp. 20-38.

[35] Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 Columbia L. Rev. 391, 393 (1963).

ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field." [36]

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It may well be that a means of deliverance from this constitutional impasse is at hand.

When this Court decided *New York Times* v. *Sullivan*,[37] "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," [38] it gave the First Amendment new perspective, and for the first time since the unfortunate language in *Chaplinsky* v. *New Hampshire*[39] was followed in *Beauharnais* v. *Illinois*[40] and *Roth* v. *United States*,[41] replaced within the protections of the First Amendment a segment of speech which had previously been removed.[42] Whether this holding marks the beginning of a new direction for the Court in this sphere is too early to

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[36] *Id.* at 514.

[37] 376 U. S. 254 (1964).

[38] *Id.* at 270.

[39] 315 U. S. 568, 571 (1942), quoted *supra*, p. 6.

[40] 343 U. S. 250 (1952).

[41] 354 U. S. 476 (1957).

[42] In *Beauharnais*, the Court found "libelous utterances not . . . within the area of constitutionally protected speech . . ." 343 U. S. 250, 266 (1952). *New York Times* v. *Sullivan* returned libel, at least against public officials, to the scope of First Amendment protections.

determine,[43] but some of Mr. Justice Brennan's language in his opinion for the Court[44] is pregnant with promise:[45]

> "In *Beauharnais* v. *Illinois*, . . . the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and 'liable to cause violence and disorder.' *But the Court was careful to note that it 'retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel'*. . . .
>
> In deciding the questions [of constitutional limitations upon the power to award damages for libel of a public official] *we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels'*. . . .
>
> Like 'insurrection', contempt, advocacy of unlawful acts, breach of the peace, *obscenity,* solicitation of legal business and the various other formulae for the repression of expression that have been challenged in this court, *libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.*" (Emphasis and bracketed material supplied.)

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[43] See *Garrison* v. *Louisiana*, 379 U. S. 64 (1964) (concurring opinion): "*Beauharnais* v. *Illinois*, . . . a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment. I think it is time to face the fact that the only line drawn by the constitution is between 'speech' on the one side and conduct or overt acts on the other."

[44] The entire Court concurred in the result. Black, Douglas and Goldberg, *JJ.* concurred on still broader grounds.

[45] 376 U. S. 254, 268-269 (1964).

If *Beauharnais* has not been reversed so far as its peculiar facts are concerned, the above language suggests rather clearly that its rationale has been severely undercut and that this Court now regards all classifications of expression, even "obscene speech", to be within the ambit of First Amendment protections.

Furthermore it must be observed that the basic approach of *Beauharnais,* bottomed as it was upon the holding that "libelous utterances [are] not . . . within the area of constitutionally protected speech," has been explicitly rejected by the Court in *New York Times* v. *Sullivan.*

The questionable value of *Beauharnais* as precedent in its present posture is of particular relevance to the re-examination of the holding in *Roth* that obscene speech is not protected by the First Amendment, for the *Roth* opinion relies exclusively on *Beauharnais* for supportive precedent on that point.[46] That the decline and fall of *Beauharnais* as a precedent has left *Roth* like a structure without a foundation, cannot be denied.

Amici have attempted to demonstrate that *Roth* v. *United States* was decided in violation of fundamental First

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[46] "It is insisted that the constitutional guarantees are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, or will probably induce its recipients to such conduct. *But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in Beauharnais* v. *Illinois* . . .

'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.' " (Emphasis supplied.) *Roth* v. *United States,* 354 U. S. 476, 485-486 (1957).

Amendment principle in the first place, that experience under the *Roth* rule has been futile, and that subsequent decisions in other First Amendment areas have exposed the *Roth* holding for the anachronism that it is.

As the Court observed in *Roth*:

> "The door barring federal and state intrusion into [the area of fundamental freedoms of speech and press] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." [47]

II.

The test of obscenity as announced in *Roth* v. *United States* and interpreted in subsequent decisions is vague and unworkable and inhibits the dissemination of expression which is not obscene and clearly within the protective scope of the First Amendment.

It has already been argued that the holding in *Roth* v. *United States*, 354 U. S. 476, 485 (1957) "that obscenity is not within the area of constitutionally protected speech or press" is a drastic curtailment of First Amendment protections.

We also urge that the standards expressed by the Court in *Roth* and interpreted in subsequent cases, for determining what forms of expression are "obscene" and therefore not entitled to constitutional protection should be re-examined because they are vague, unworkable and inhibit the dissemination of constitutionally protected expression.

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[47] 354 U. S. 476, 488 (1957).

Obscenity, as defined in *Roth,* is "material which deals with sex in a manner appealing to prurient interest," or "material having a tendency to excite lustful thoughts." Obscenity is "utterly without redeeming social importance." 354 U. S. at 484. Furthermore, "the *Roth* standard [for holding material obscene] requires . . . a finding that the material 'goes substantially beyond customary limits of candor in description or representation of [sexual] matters,'" *Jacobellis* v. *Ohio,* 378 U. S. 184, 191 (1964), an element labeled "patent offensiveness." *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482 (1962). Rejecting the standard of *Regina* v. *Hicklin,* [1868] L. R. 3 Q. B. 360, in *Roth,* this Court substituted this test:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. at 489.

Thus the Court, having excepted "obscenity" from the protections of the First Amendment, was faced with the task of describing the limits of the exception with sufficient particularity to insure constitutional protection for other "non-obscene" forms of expression.

That it failed, in the view of *amici,* in *Roth* and in subsequent cases to delimit sufficiently precise boundaries for unprotected utterances demonstrates the difficulty of the assignment rather than the Court's failure to recognize the importance of its assigned task.[48] Although *Roth* liberalized the *Hicklin* test of obscenity by requiring con-

[48] "It is * * * vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Roth* v. *United States,* 354 U. S. at 488.

sideration of "the dominant theme of the material taken as a whole" and its effect upon "the average person" instead of judging the material "by the effect of an isolated excerpt upon particularly susceptible persons,"[49] and although many of the subsequent decisions of this Court following *Roth* have strictly limited obscenity convictions by the lower courts,[50] the test that *Roth* substituted has created as many problems as it has solved.

Mr. Chief Justice Warren[51] and Justices Black,[52] Douglas,[53] and Harlan,[54] have themselves raised serious questions as to the wisdom of the *Roth* test of obscenity.

Mr. Justice Douglas's critique of the *Roth* verbal formula in his dissenting opinion in *Roth*, in which Mr. Justice Black concurred, laid bare its inherent defectiveness as a constitutional standard:

> "Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under the test, juries can censor, suppress, and punish what they don't like, provided the matter relates to 'sexual impurity or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. It creates

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[49] *Roth* v. *United States*, 354 U. S. at 488-489.

[50] See cases collected in footnote 12, *supra*.

[51] Concurring in the result in *Roth*, 354 U. S. at 494-495.

[52] *Smith* v. *California*, 361 U. S. 147, 157 (1959) (concurring opinion).

[53] Dissenting in *Roth*, 354 U. S. at 512-514.

[54] Concurring in part and dissenting in part in *Roth*, 354 U. S. at 497-498.

a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that 'censorship of obscenity has almost always been both irrational and indiscriminate.' * * * The test adopted here accentuates that trend.

* * * * *

"The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

* * * * *

"I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has 'no redeeming social importance.'

* * * * *

"For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless." 354 U. S. at 512, 513, 514.

Nor have the text-writers been silent in their criticism of the obscenity test formulated in *Roth*.[55]

[55] E.g., *Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Kalven, *Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960).

While *amici* have no quarrel with *Roth* insofar as it rejects the *Hicklin* rule of judging material by isolated passages and by its effect on particularly susceptible persons,[56] the test formulated in *Roth* presents a perplexing problem of application to those who would use the pronouncements of the Court for guidance in dealing with obscenity prosecutions.

FIRST: How are the standards of sex portrayal "in a manner appealing to prurient interest" and "having a tendency to excite lustful thoughts" to be applied in concrete cases?

SECOND: Who is the "average person" whose "prurient interest" or "lustful thoughts" need be aroused before material may be adjudged obscene? What of material designed for a special audience?

THIRD: How is the determination that material is "utterly without redeeming social importance" to be made?

A. *Obscenity Standards of Sex Portrayal.*

Since obscenity as defined in *Roth* is "material which deals with sex in a manner appealing to prurient interest," [57] it is necessary to inquire what, if any, constitutional meaning "prurient interest" has. Apparently the term was expropriated from a proposed draft of the Model Penal Code of the American Law Institute.[58] The Institute's definition of "prurient interest" is "*shameful* or *morbid*

[56] See Judge Learned Hand's critical analysis of the defective and now defunct *Hicklin* rule in *United States* v. *Kennerley*, 209 Fed. 119, 120-121 (D. S. D. N. Y., 1913).

[57] 354 U. S. at 487.

[58] A. L. I., Model Penal Code, Tent. Draft No. 6 (1957) §207.10 (2): "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest * * *."

interest in nudity, sex or excretion" [59] or "an *exacerbated, morbid,* or *perverted* interest growing out of the conflict between the universal sex drive of the individual and equally universal social controls of sexual activity." [60] (Emphasis supplied.) Are not these definitions descriptive of something other than normal sexual interest or arousal? Or did the Court intend some other meaning to be attached to the words "prurient interest"? If so, does the court equate "prurient interest" with normal sexual arousal? If not, what becomes of the "average person" whose sexual arousal determines whether or not utterances shall have constitutional protection? May an "average person" have an "exacerbated, morbid or perverted" sexual interest?

Nor is the recent pronouncement of members of this Court particularly illuminating in dealing with this problem. Although equating "prurient interest" with "impure desires relating to sex," Mr. Justice Harlan, speaking for himself and Mr. Justice Stewart, remarked:

> " * * * one would not have to travel far even among the acknowledged masterpieces in any of these fields [literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer." *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962).

Moreover, since the Court in *Roth* defined obscenity not only as "material which deals with sex in a manner appealing to prurient interest" but, in the alternative, as "material having a tendency to excite lustful thoughts," a concept expressly rejected by the American Law Insti-

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[59] *Ibid.*

[60] *Id.* at 29.

tute,[61] it is not clear whether the Court intended to incorporate the Model Penal Code definition into its obscenity formula or whether, as Mr. Justice Harlan put it, the Court "merely assimilate[d] the various tests into one indiscriminate potpourri." [62] These ambiguities provide ample cause for concern "[b]ecause First Amendment freedoms need breathing space to survive," and therefore, "government may regulate in the area only with *narrow specificity*." [63] (Emphasis supplied.)

The studies of the behavioral sciences in this area further illuminate the difficulties involved in ascertaining a constitutionally valid meaning for "prurient interest." It is an acknowledged fact that the studies have failed to reveal a direct causal relationship between exposure to obscenity and overt anti-social conduct,[64] without more. Of itself,

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[61] "* * * We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." A. L. I., Model Penal Code, Tent. Draft No. 6 (1957) §207.10(2). Comment, p. 10.

[62] 354 U. S. at 500.

[63] *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 433 (1964).

[64] See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S.* v. *Roth,* 237 F. 2d 796, 804 (2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts,* 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40 (1942); see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S.* v. *Roth, supra*); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 387 (1954); *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101 (1949); The Institute for Sex Research, Inc., *Sex Offenders* (1965) pp. 126-127, 669-692; and see Murphy, *The Value of Pornography,* 10 Wayne L. Rev. 655 (1964).

"this absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control." [65]

A recent study by Cairns, Paul and Wishner[66] reveals useful information of a more positive nature. Using sexual arousal as a physiological phenomenon more easily measured than "prurient interest," whatever the precise meaning of the latter term may be, the findings of the authors (two behavioral psychologists and a professor of law), after an examination of the psychological abstracts and a number of human experiments, are interesting and illuminating:

> "1. A significant proportion of our society is sexually aroused to some extent by some form of sex stimuli in pictures and probably in books.
>
> 2. Portrayals of female nudity and of sexual activity lead to sexual arousal in many males—adolescents as well as adults. These materials arouse females far less frequently.
>
> 3. Females, on the other hand, are more frequently sexually aroused than men by complex stimuli which portray 'romantic' or 'love' relationships and which constitute, in general, less direct sexual cues.
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> 4. Males differ among each other in terms of preference for and response to various types of sex stimuli. Factors which account for different preferences among

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[65] Douglas, *J.* dissenting in *Roth,* 354 U. S. 476, 511 (1957).

[66] Cairns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence,* 46 Minn. L. Rev. 1009 (1962).

males for viewing sexually relevant materials include: adequacy of masculine sexual identity, strong guilt with respect to sexual behavior, physical maturity and intellectual ability.

5. The environmental circumstances under which the sex stimuli are viewed may influence the extent to which the viewers will show evidence of sexual arousal. It is not clear, however, whether the failure to observe evidence of sexual arousal is due to the fact that no arousal occurred or that the overt expression of the arousal was inhibited.

6. Exposure to certain types of sex stimuli is, for some persons, both males and females, a distinctly aversive experience. Sexual guilt appears to be an important determinant of the extent to which viewing sexually relevant material will be considered an unpleasant event." 46 Minn. L. Rev. at 1032.

These findings with respect to sexual arousal—which probably is a lesser physiological or emotional reaction than arousal of prurient interest—demonstrate on the basis of scientific evidence what those who have considered the social problem of obscenity for years have known that there are so many environmental and personality variables in the arousal of lustful thoughts or prurient interest that the determination of the precise books or pictures which are universally sexually stimulating is a metaphysical quest foredoomed to failure; what is sexually arousing to males holds no prurient interest to females; what excites lustful thoughts in females has no particular sexual effect upon males and is so widespread throughout our culture as to be impossible to eradicate by criminal prosecutions. Personality, maturity and intelligence differences and varying

quantities of guilt feelings about sexual matters cause vast differences in sexual response to the same stimuli even among males. What is sexually arousing to some is disgusting to others. The environmental factors under which sexual material is seen may cause significant differences in response in both males and females. As Judge Bok wisely observed more than a decade before this study:

> "If [the individual] reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book, or another? When, where, how, and why are questions that cannot be answered clearly in this field * * * in a field where even reasonable precision is utterly impossible, I trust people more than I do the law." *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101, 137 (1949).

One more matter of concern with regard to the "prurient interest" and "lustful thoughts" language in *Roth.* Since obscenity is defined as "material that appeals to prurient interest" and equated with "material that has a tendency to excite lustful thoughts," what kind of a showing is necessary to establish that the material to be judged actually has the effect of arousal or excitement? Must a causal relationship be demonstrated between the publication and the pruriency, between the literature and the resultant lust, or will such "appeal" or "tendency to excite" be presumed? What standards are to be applied to determine the appeal and the tendency of the disputed material? Or is the inten-

tion of the creator of the book or picture controlling? What of the literary panderer whose intent is vile but whose book or picture fails to achieve his evil goal?

The cases since *Roth* have not answered these questions. They are, we suspect, unanswerable. Thus, the determination of what arouses "prurient interest" or excites "lustful thoughts" [67] is a vast guessing game, with the constitutional right of freedom of expression and the suppression of literature and art hanging in the balance.

B. *The "Average Person."*

While the substitution in *Roth* of "the average person" for "particularly susceptible persons" as the subject whose sexual arousal is the litmus of obscenity represents a logical liberalization of the *Hicklin* rule, this portion of the *Roth* obscenity test presents monumental problems as well.

Although it is now clear that neither what can safely be shown to children[68] nor to the emotionally unstable among us[69] provides an acceptable constitutional standard for censorship of obscenity, the positive determination of who is "the average person" to which *Roth* refers has few guidelines. He has been identified as the counterpart, in the law of obscenity, of the "reasonable man" in the law of torts.[70] But the delineation of the conduct of a "reasonable man" in negligence suits does not determine whether basic constitu-

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[67] See *Winters* v. *New York*, 333 U. S. 507, 515-516, 520 (1948).

[68] *Butler* v. *Michigan*, 352 U. S. 380 (1957).

[69] *Roth* v. *U. S.*, 354 U. S. 476, 488-489.

[70] *U. S.* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S. D. N. Y. 1933), aff'd 72 F. 2d 705 (2d Cir. 1934). Cf. Judge Frank's critique of the "reasonable man" test in *U. S.* v. *Roth*, 237 F. 2d 796, 826-827 (2d Cir. 1956) (concurring opinion).

tional protections are to be granted or withheld, as in the area of obscenity censorship. And the analogy further breaks down when one considers that, since the vast majority of people neither know nor care about literary or artistic qualities,[71] the standard of the composite fiction of "the average person" will include multitudes who were never intended to be the audience for the particular tract or motion picture in question and who, but for the publicity resulting from the obscenity prosecution, would never have experienced it. Moreover, one may well ask: Is the "average person" composite to be drawn from the 95% of the total male population who would be convicted if the sex laws now on the books were strictly enforced?[72]

Is a tract designed for a special audience to be judged by the standard of "the average person" outside the group?[73]

What of foreign movies imported to be shown in "art" motion picture houses? Is it the "average" art theater patron whose prurient interest is in issue in this context?

Moreover, if the test of obscenity is to turn upon the nature of the audience which is exposed to it, would it not be curious to find that the publicity surrounding an obscenity prosecution could, by calling the attention of the prurient-minded public to it, change the composition and size of the audience so as to render material obscene which at the outset of the prosecution clearly was not?

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[71] *Commonwealth* v. *Isenstadt,* 318 Mass. 543, 553, 62 N. E. 2d 840, 846 (1945).

[72] Kinsey, *Sexual Behavior in the Human Male* (1948), at 217 et seq.; *Report of the Committee on Forensic Psychiatry,* Group for the Advancement of Psychiatry (No. 9, Rev. 1950); Kronhausen, *Pornography and the Law* (1959), at 155 et seq.

[73] Cf. *Manual Enterprises, Inc. et al.* v. *Day,* 370 U. S. 478, 82 S. Ct. 1432, 1434 (1962).

The concept of "the average person" disintegrates completely as a valid test when it is applied to what has been described as "hard core" pornography.[74] It has been widely noted that "hard core" pornography, far from having appeal to normal or "average" persons, is disgusting to them; it seems to appeal only to the sexually inadequate: "the frightened, the impotent, the bored and sated, the senile * * * the adolescent * * * not yet old enough to seek sexual partners or * * * [the person who] has lost the precious power of spontaneous sexual feeling." [75]

Thus, even in a case dealing with "hard core" pornography, the "appeal to the average person's prurient interest" test is entirely useless because pornography is "appealing" only to the decidedly "non-average" individual and is repulsive to "the average person" in the standard.

C. *Determining What Is "Utterly Without Redeeming Social Importance."*

In *Roth* the Court described obscenity which was not constitutionally protected as "utterly without redeeming social importance." Thus, the Court has embarked upon the project of determining which books and pictures have any social importance, at least as to those which might otherwise be obscene. We suggest, as did Mill, that "the usefulness of an opinion is itself a matter of opinion: as disputable, as

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[74] Brief for the United States, pp. 37-39 in *Roth* v. *U. S.*, *op. cit.*

[75] Margaret Mead, *Sex and Censorship in Contemporary Society*, New World Writings (Third Mentor Selection 1953) at pp. 18-19; and see D. H. Lawrence, *Pornography and Obscenity in Sex Literature and Censorship* 74-77 (1953): "[Pornographic books] are either so ugly they make you ill, or so fatuous you can't imagine anybody but a cretin or a moron reading them, or writing them."

open to discussion, and requiring discussion as much as the opinion itself." [76]

Although the "social importance" standard was undoubtedly designed by this Court to protect expression which might otherwise be obscene, the judicial exploration of the social value of books or pictures as a factor in determining whether or not they should be suppressed is an imposing task which has dangerous implications to freedom of expression. As Mr. Justice Douglas has pointed out:

> "The First Amendment * * * was designed to preclude courts as well as legislatures from weighing the values of speech against silence." *Roth* v. *U. S.*, 354 U. S. at 514 (dissent).

It seems curious, to say the least, that only in the area of sexual expression must a distributor of printed material affirmatively prove that the publication has social importance before he can demonstrate his right to disseminate it. In all other spheres of expression, First Amendment protections do not depend upon "the truth, popularity, or social utility" of the material sought to be suppressed,[77] for if all utterance were limited to wisdom, knowledge, truth, and social value many of us would be required to stand mute virtually all our lives.

The danger involved in determining which public utterances have "redeeming social importance" was well understood by John Stuart Mill.

> "Mankind can hardly be too often reminded, that there was once a man named Socrates, between whom and

[76] John S. Mill, Essay on Liberty.

[77] *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445 (1963).

the legal authorities and public opinion of his time there took place a memorable collision. * * * This acknowledged master of all the eminent thinkers who have since lived—whose fame, still growing after more than two thousand years, all but outweighs the whole remainder of the names which make his native city illustrious—was put to death by his countrymen, after a judicial conviction, for impiety and immorality. Impiety, in denying the gods recognised by the State; indeed his accuser asserted (see the 'Apologia') that he believed in no gods at all. Immorality, in being, by his doctrines and instructions, a 'corrupter of youth.' Of these charges the tribunal, there is every ground for believing, honestly found him guilty, and condemned the man who probably of all then born had deserved best of mankind to be put to death as a criminal."

* * * * *

"If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they

lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."

"* * * We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."

John Stuart Mill, *Essay on Liberty.*

To illustrate, it may well be that, despite the Comstocks and the bluenoses, there is social value in the smuttiest literature, the most "hard core" of pornography, the most offensive of pictures. Our medical and behavioral scientists are beginning to discover that these materials act as releases of tension to the sexually frustrated, unhappy or abnormal unfortunates who might otherwise act out their sexual fears and hostilities in criminal conduct dangerous to themselves as well as to others.

Consider, for example, the comment of Dr. Benjamin Karpman, chief psychotherapist of St. Elizabeth Hospital, Washington, D. C., reported in Kronhausen, E. and P., *Pornography and the Law,* 273-274 (1959):

"Contrary to popular misconception, people who read salacious literature are less likely to become sexual offenders than those who do not, for the reason that such reading often neutralizes what aberrant sexual interest they may have."

And see Murphy, *The Value of Pornography,* 10 Wayne L. Rev. 655, 660-661 (1964):

"With regard to the assumption that reading pornography leads directly to acts of violence and public offenses, evidence would seem to show that the indi-

vidual who collects pornography, who derives his primary sexual gratifications from the production, collection or perusal of pornography, and who is denominated for these reasons a pornographer, is a shy introvert. Quietly and privately, he takes his pleasure and obtains release from his tensions through study of pictures, films, books, cartoons, phonograph records, carvings or whatever represents or depicts for him a pornographically eroticizing experience. What excites him at this remove may be the description of conventional sexual conduct which is barred to him by impotency, physical handicap, fear or repugnance. What is depicted may be perverse sexual practices which he is too frightened or ashamed to participate in himself or to even directly view. One of the most outstanding attributes of the pornographer is his inhibition. It is not unreasonable to expect that when he is deprived or—what is more likely—is driven by conscience to deprive himself of this vicarious release, *tension might accumulate to a point of violence or public display. Hence it would seem that the opportunity to indulge in pornography could serve to prevent or postpone, rather than to stimulate, such outbreaks of violence by the pornographer.*" (Emphasis supplied.)

It is not here contended that pornography has great social value, or any. It is enough that the possibility of value exists to compel humility and superabundant caution among those who would suppress any form of expression. For after the book-burning[78] it is too late to re-evaluate the social value of the contents.

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[78] This is not merely vivid language of *amici*. See *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964) (book-burning statute held unconstitutional).

Or, to say it another way in the language of the Court, the "redeeming social importance" justifying the dissemination of all forms of expression, if not found in the work itself, is found in the fabric of freedom woven by its uncensored use.

CONCLUSION

Amici have attempted to demonstrate some of the areas of obscurity and logical impasse which arise in specific applications of the rule in *Roth* as a result of the failure to apply the "clear and present danger" test in the obscenity area. We believe, as does Mr. Justice Harlan[79] that "it is no answer to say * * * that obscenity is not protected speech." Where matters of expression are involved, a failure to define precisely, accurately and with predictability the items which may be censored, cannot fail "to impose a severe limitation on the public's access to constitutionally protected matter," [80] both by misinterpretation of the stated tests by the lower courts and by the extrajudicial pressures of threatened prosecutions,[81] "under dangers which are hazarded only by heroes." [82]

In the view of *amici*, the attempt in *Roth* to differentiate between utterances which are constitutionally protected and

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[79] *Roth* v. *U. S.*, 354 U. S. at 507 (concurring in part and dissenting in part).

[80] *Smith* v. *California*, 361 U. S. 147, 153 (1959).

[81] E.g., *New American Library* v. *Allen*, 114 F. Supp. 823 (N. D. Ohio 1953); *American Mercury, Inc.* v. *Chase*, 13 F. 2d 224, 225 (D. C. Cir. 1926); *Bantam Books, Inc.* v. *Melko*, 25 N. J. Super. 292, 96 A. 2d 47 (1950).

[82] *Dennis* v. *U. S.*, 341 U. S. 494, 550 (1951) (Frankfurter, *J.*, concurring).

those which are not, has been unsuccessful because of vagueness, unworkability and, most important, the setting of standards to test expression which carry dangerous implications for the "fullest possible opportunity for the free play of the human mind." [83]

It will be contended by those who would suppress all disagreeable or offensive art and literature that obscenity is a social problem which must be controlled, even at the expense of some unfortunate but necessary inroads upon free expression. But we think it more accurate to say that traffic in obscenity (which requires consumers as well as purveyors) is a symptom of a social problem rather than an evil *per se*. For that precise reason it is both ineffectual and dangerous to attempt to treat the problem solely by prosecutions, broad in scope, which ignore entirely the underlying cultural, social and personality factors which make autoerotic fantasy material attractive to large segments of the public.

As Mr. Justice Warren, concurring in the result in *Roth*, has cautioned:

> "To recognize the existence of a [social] problem * * * does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments." 354 U. S. at 495.

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[83] *Dennis* v. *U. S.*, *supra*, at 550 (Frankfurter, *J.*, concurring).

Whatever legislatures and courts may seek to accomplish in this area, it must be borne in mind that:

> "The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." [84]

For all of the foregoing reasons, the convictions should be reversed.

Respectfully submitted,

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[84] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943) (Hand, L., *J.*).